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IN THE

**SUPREME COURT OF THE UNITED STATES**

October Term, 1978

No. 81, Original

**COMMONWEALTH OF KENTUCKY,** Plaintiff,

*versus*

**STATE OF INDIANA and  
THEODORE I. SENDAK, Attorney General of  
the State of Indiana,** Defendants.

1. MOTION FOR LEAVE TO FILE COMPLAINT.
2. COMPLAINT.
3. BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT.

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# SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. \_\_\_\_\_, Original

COMMONWEALTH OF KENTUCKY, - - - Plaintiff,

v.

STATE OF INDIANA and  
THEODORE L. SENDAK, Attorney General  
of Indiana, - - - Defendants.

## MOTION FOR LEAVE TO FILE COMPLAINT

The Commonwealth of Kentucky, appearing by its duly authorized Attorney General, Robert F. Stephens, respectfully moves the Court for leave to file its Complaint against the State of Indiana and Theodore L. Sendak, Attorney General of the State of Indiana, submitted herewith.

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v.

STATE OF INDIANA and  
THEODORE L. SENDAK, Attorney General  
of Indiana, - - - Defendants.**COMPLAINT**

Comes the Plaintiff, the Commonwealth of Kentucky, by and through its Governor and Attorney General, and for its cause of action against the State of Indiana states as follows:

**I. JURISDICTION**

1. That the jurisdiction of this Court is invoked under Article III, Section 2, Clause 2, of the Constitution of the United States, and 28 U.S.C., Section 1251.
2. That the Plaintiff the Commonwealth of Kentucky since the 1st day of June, 1792, to the present has been a State of the United States.

3. That the Defendant State of Indiana since the 16th day of December, 1816, to the present has been a State of the United States.

**II. CAUSE OF ACTION**

4. That the Commonwealth of Kentucky was established by the separation of the District of Kentucky from the jurisdiction of the Commonwealth of Virginia pursuant to that certain act of the Virginia Legislature entitled "An act concerning the erection of the district of Kentucky into an independent state," passed on the 18th day of December, 1789, which act is known as the Virginia-Kentucky Compact.
5. That under said Virginia-Kentucky Compact the Commonwealth of Kentucky, upon its admission into the Union on the first day of June, 1792, thereby succeeded to whatever rights Virginia previously had within its territorial limits.
6. That the State of Indiana was established from the land ceded by legislative act of the Commonwealth of Virginia to the United States on the 1st day of March, 1784, which act is known as the Cession of Virginia.
7. That the State of Indiana, upon admission into the Union, acquired thereby no other or greater rights, either as to soil or jurisdiction, than the United States had acquired under the Cession of Virginia.
8. That the northern boundary line of the Commonwealth of Kentucky was established from the Cession of Virginia and the Virginia-Kentucky Com-

pact as the low-water mark as it may from time to time exist on the northerly side of the Ohio River.

9. That the State of Indiana through the acts and statements of its officials has claimed that the boundary line between the States of Indiana and Kentucky is static and unchanging and was established as the low-water mark on the northerly side of the Ohio River as it existed in the year 1792.

10. That the 1792 northerly low-water mark of the Ohio River has been obscured by normal and gradual processes of erosion and accretion and is presently unascertainable at various locations.

11. That the Commonwealth of Kentucky through the acts and statements of its officials has claimed in the past, and now claims, that the boundary line between the States of Kentucky and Indiana is subject to change from time to time and is the low-water mark on the present northerly shore of the Ohio River rather than the partially undeterminable 1792 northerly low-water mark.

12. That a serious and justiciable controversy exists in that the State of Indiana is now assessing property taxes on, and exercising regulatory jurisdiction over, property located below the present low-water mark on the northern shore of the Ohio River in accordance with its view of the location of the boundary line and is thus taxing, attempting to exercise police power over, and regulating property which the Commonwealth of Kentucky believes to be wholly within its borders.

13. That several boundary disputes between the States of Kentucky and Indiana have occurred in the past, including previous original actions brought in this Court, and therefore it is of utmost importance that the Court once and for all resolve the entire boundary line between said States since a decision with respect to only a part of said boundary line will be of little or no value.

14. That the Plaintiff, the Commonwealth of Kentucky, has no adequate remedy at law and, furthermore, the questions of sovereignty and jurisdiction presented herein with respect to the entire boundary line between the States of Kentucky and Indiana have never been resolved by this Court.

WHEREFORE, the Plaintiff prays that the State of Indiana be required to answer the matters herein set forth and that upon a final hearing on the merits of this case this Court by order and decree, declare and establish the boundary line between the Commonwealth of Kentucky and the State of Indiana as being the low-water mark on the northerly side of the Ohio River as it presently exists, subject to the normal processes of accretion and erosion which may occur from time to time.

Further, the Plaintiff prays that the State of Indiana be permanently enjoined and restrained from disturbing the Commonwealth of Kentucky and its citizens in the peaceful enjoyment and use of its land, water and jurisdiction in any manner inconsistent with this Court's decision.

The Plaintiff also prays any further relief as may be granted by this Court.

THE COMMONWEALTH OF KENTUCKY

by: \_\_\_\_\_

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STATE OF INDIANA and  
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BRIEF IN SUPPORT OF MOTION FOR LEAVE  
TO FILE COMPLAINT

JURISDICTION

The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the Constitution of the United States, and under Title 28, United States Code, Section 1251(a) (1).

QUESTION PRESENTED

What is the boundary line between the Commonwealth of Kentucky and the State of Indiana?

## NATURE OF THE CONTROVERSY

This brief is submitted in support of the Motion of Plaintiff, Commonwealth of Kentucky (hereinafter "Kentucky"), for Leave to File Complaint in an original action brought before the Supreme Court of the United States to resolve a dispute as to the location of the boundary line along the Ohio River between Kentucky and the State of Indiana (hereinafter "Indiana"). This action is yet another in the never-ending stream of interstate boundary disputes which have properly been brought before, and decided by, this Court. See *infra* at 13.

The Commonwealth of Kentucky now claims and has always claimed that the boundary between it and the State of Indiana is the low-water mark on the present northern shore of the Ohio River, wherever that mark may be located from time to time. See *Handly's Lessee v. Anthony*, 18 U. S. (5 Wheat.) 374 (1820). Kentucky thus recognizes that the Ohio River boundary is subject from time to time to gradual change caused by erosion and accretion. Indiana, on the other hand, apparently now claims as the basis for its issuance of a number of permits that the boundary line between it and Kentucky is static and unchanging and will for all times be the northern low-water mark of the Ohio River as that mark existed in the year 1792, when Kentucky was admitted into the Union. See Transcript of Proceedings Before the Atomic Safety and Licensing Appeal Board in the Matter of Public Service Company of Indiana, Inc., Docket Nos.

STN 50-546, 50-547, at 74-76 (August 15, 1978), attached hereto as Exhibit I.

This dispute between Indiana and Kentucky over their Ohio River boundary has recently been brought to light in several instances where Indiana is (1) attempting to tax businesses located along the northern shore of the Ohio River and south of the low-water mark, and (2) seeking to regulate the activities of public utilities located within said questioned boundary. Similar boundary disputes have arisen between Kentucky and Indiana in the past with respect to particular locations along the Ohio River. See *Indiana v. Kentucky*, 136 U. S. 479 (1890) (wherein the Kentucky-Indiana boundary in the Green River Island area was found to be the low-water mark); *Handly's Lessee v. Anthony*, 18 U. S. (5 Wheat.) 374 (1820) (wherein Chief Justice Marshall found that the Kentucky-Indiana boundary was the northern low-water mark of the Ohio River wherever that mark may be). In order to resolve a specific dispute in 1943, the two states entered, with the approval of Congress, into a compact with respect to the boundary in the Green River Island area. 1942 Ky. Acts, Ch. 116; 1943 Ind. Acts, Ch. 2; 57 Stat. 248 (1943). There have also been disputes between Kentucky and Ohio with respect to the same northern boundary, one of which is still pending before this Court.<sup>1</sup> It is clear that Indiana does not

<sup>1</sup>*Ohio v. Kentucky*, No. 27, Original (Sup. Ct., filed March 31, 1966). See also *Ohio v. Kentucky*, 410 U. S. 641 (1973). Should this Court grant the within Motion and agree to hear this case, it might at some point be appropriate to consolidate the still pending (Footnote continued on following page)



recognize any rights of Kentucky to the Ohio River other than those rights possessed in the year 1792, and Indiana is thus denying the sovereignty of the Commonwealth of Kentucky over the portion of the Ohio River south of its present-day low-water mark by seeking to exercise its tax and police powers over land located within Kentucky.

## ARGUMENT

### I. The Dispute Between Kentucky and Indiana Presents a Justiciable Issue and Should Therefore Be Heard by This Court.

#### A. THE INVASION OF KENTUCKY'S RIGHTS BY INDIANA IS OF SERIOUS MAGNITUDE.

By the terms of Article III, Section 2 of the Constitution of the United States, this Court is empowered to hear controversies between States of the Union. It has been a long-recognized principle of jurisprudence, however, that this Court will not exert its power to control the conduct of one state at the suit of another unless the threatened invasion of the state's rights is of serious magnitude. See *Connecticut v. Massachusetts*, 282 U. S. 660 (1931) (diversion of stream by the Commonwealth of Massachusetts held not serious at time of action since the State of Connecticut had not yet been deprived of any water of which it could make use); *Alabama v.*

(Footnote continued from preceding page)

Ohio case with this action as the ultimate legal question in both cases is substantially similar. That is, both cases present this Court with an opportunity to resolve once and for all the nature and present location of the northern boundary of Kentucky as that boundary is shared with the States of Indiana and Ohio.

*Arizona*, 291 U. S. 286 (1934); *Washington v. Oregon*, 297 U. S. 517 (1936) (diversion of stream by the State of Oregon); *Colorado v. Kansas*, 320 U. S. 383 (1943), *reh. denied*, 321 U. S. 803 (1944).

However, this Court has also indicated that it has "a serious responsibility to adjudicate cases where there are actual, existing controversies over how interstate streams should be apportioned among States." *Arizona v. California*, 373 U. S. 546, 564 (1963) (original action by State of Arizona arising out of actions of State of California in withdrawing water from the Colorado River). This Court's responsibility is no less serious when the dispute involves not the water in the stream but sovereignty over the stream itself.

In the case at bar, it is clear that the invasion of Kentucky's rights is of serious magnitude. First, the invasion of those rights is not only threatened but actual, for Indiana has already attempted to tax properties located within the territorial confines of Kentucky and has attempted to exercise regulatory jurisdiction over portions of the Ohio River. Second, both of these actions on the part of Indiana effectively deny the sovereignty of Kentucky and thus present as serious a controversy between two states as one may imagine. Kentucky has demonstrated that the controversy at hand is of sufficient magnitude to warrant consideration by this Court.

**B. THE DISPUTE BETWEEN THE STATES OF KENTUCKY  
AND INDIANA PRESENTS AN ACTUAL CONTROVERSY  
WHICH IS RIPE FOR JUDICIAL DETERMINATION BY  
THIS COURT.**

By the terms of the Constitution itself the original jurisdiction of the Supreme Court extends to "controversies between two or more states." Thus, before this Court can hear the claims of Kentucky in the present action, it must be shown that a controversy exists between the States of Kentucky and Indiana, and that the controversy be in fact between the states themselves.

This Court has said that where there is an alleged justiciable controversy between states within its original jurisdiction over such controversies, it must appear that the complaining state has suffered a wrong due to the action of the other state, furnishing grounds for judicial redress, or is asserting a right against the state which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence. *Massachusetts v. Missouri*, 308 U. S. 1 (1939). This same standard has been expressed in other terms, *i.e.*, a controversy exists if the dispute between two states, entirely independent, is properly the subject of diplomatic adjustment with respect to the states in their capacity as quasi-sovereigns. *North Dakota v. Minnesota*, 263 U. S. 365 (1923).

It is readily apparent that the action here in issue satisfies the controversy requirement. The adjudication of a boundary dispute between two states has long been recognized as a type of relief available in a court of

equity. *Texas v. Florida*, 306 U. S. 398, 411 (1939). Indeed, from the earliest stage of our nation's history, it has been assumed without discussion that a boundary dispute between two states satisfies both of the above standards defining a justiciable controversy. *New Jersey v. New York*, 30 U. S. (5 Pet.) 284 (1831); *Missouri v. Iowa*, 48 U. S. (7 How.) 660 (1849); *Florida v. Georgia*, 58 U. S. (17 How.) 478 (1855) ("And it is settled by repeated decisions, that a question of boundary between States is within the jurisdiction thus conferred."); *Alabama v. Georgia*, 64 U. S. (23 How.) 505 (1860); *Missouri v. Kentucky*, 98 U. S. (11 Wall.) 395 (1870); *Virginia v. West Virginia*, 78 U. S. (11 Wall.) 39 (1871); *Indiana v. Kentucky*, *supra*; *Nebraska v. Iowa*, 143 U. S. 359 (1892); *Iowa v. Illinois*, 147 U. S. 1 (1893); *Louisiana v. Mississippi*, 202 U. S. 1 (1906); *Oklahoma v. Texas*, 256 U. S. 70 (1921); *Oklahoma v. Texas*, 258 U. S. 574 (1922).

The only instance in which this Court has addressed, at any length, the issue of its power to hear boundary disputes between states is in the case of *Rhode Island v. Massachusetts*, 37 U. S. (12 Pet.) 657 (1838). Mr. Justice Baldwin, writing for the Court, explored that issue in detail. His construction of the Constitution, which was held to confer upon the Court jurisdiction over boundary disputes between states, has not since been questioned. Boundary disputes, then, are recognized as a class of case clearly within the jurisdiction of this Court. R. Stern and E. Gressman, *Supreme Court Practice* at 615 (5th ed. 1978).

In short, at no time during the existence of this Court has it denied a state's motion for leave to file a complaint when that complaint sets forth, as Kentucky sets forth here, a boundary dispute between two states wherein there exists an actual dispute ripe for judicial determination.

### C. THE CLAIMS ASSERTED BY KENTUCKY ARE ASSERTED IN HER CAPACITY AS SOVEREIGN.

This Court must exercise its original jurisdiction over this case because the claims asserted by Kentucky are its own and not merely those of its citizens or corporations. See *Massachusetts v. Missouri*, 308 U. S. 1 (1939); *Arkansas v. Texas*, 346 U. S. 368 (1953). It is inherent in the nature of boundary disputes that the interest asserted is that of the state, for it is by that boundary that the extent of the very sovereignty of the state is determined. Furthermore, in the case at bar, Kentucky has shown that Indiana has injured it in specific instances and will in all probability continue to do so in the future absent a resolution by this Court of the dispute herein presented. Indiana has wrongfully interfered with the right of Kentucky to tax property located within the confines of its territory and has also sought to exercise its police power over land in Kentucky by regulating the use of such property. Such interference is totally without justification on the part of Indiana in view of past decisions of this Court and the Kentucky-Indiana Compact of 1943, and disturbs Kentucky in the exercise of its sovereignty.

Another invasion of the sovereignty of Kentucky is the future discharge of nuclear waste from the Marble Hill Nuclear Power Plant into, and the future withdrawal of waters from, the Ohio River without the prior approval or permission of Kentucky. This situation is not unlike an attempt by Indiana to discharge sewage into the Ohio River, or to otherwise trespass on Kentucky property, which actions would undoubtedly constitute a serious and direct injury to Kentucky. See *Wisconsin v. Illinois*, 281 U. S. 179 (1930); *New York v. New Jersey*, 256 U. S. 296 (1921).

A final equitable consideration indicating the presence of a justiciable controversy is the fact that equity looks with favor upon the avoidance of unnecessary litigation, and a determination by this Court with respect to the northern boundary line of Kentucky will resolve that issue once and for all and thus render unnecessary any future litigation of that boundary which would otherwise undoubtedly ensue. For these reasons it is imperative that this Court make a determination of the law in general, that is, whether the boundary is the present-day boundary as it may change from time to time or the 1792 low-water mark of the Ohio River.

## II. Kentucky Asserts That the Boundary Line Between Kentucky and Indiana Is the Northern Low-Water Mark of the Ohio River as That Mark May Change From Time to Time Due to the Natural and Gradual Processes of Erosion and Accretion.

It is important for the Court to recognize that, despite a number of prior decisions in this Court relating to the Ohio River as a boundary between Kentucky and its neighboring states, none of those cases has ever purported to resolve the issue presented in this action. The issue in this case may succinctly be stated as whether the Ohio River is an ever-changing boundary, fluctuating through the gradual processes of accretion and erosion, as opposed to a static boundary fixed as of some prior point in time.

The opinion of this Court by Chief Justice Marshall in *Handley's Lessee v. Anthony*, 18 U. S. (5 Wheat.) 374 (1820), established that the boundary between Kentucky and Indiana, and with other states on the Ohio which were carved from the Northwest Territory ceded by Virginia,<sup>2</sup> is the low-water mark on the northwest side of the river.

<sup>2</sup>At the time of the Revolutionary War the Commonwealth of Virginia owed or claimed all of the land which now comprises the Commonwealth of Kentucky and the land northwest of the Ohio River. In the year 1784, Virginia ceded to the United States all of her territories northwest of the Ohio River, thus reserving to herself the rights of ownership and possession of the Ohio River which she had previously enjoyed. See 1 Laws of the United States 472, 474 (1784).

Kentucky officially became a state on June 1, 1792, and was admitted to the Union, pursuant to the Virginia-Kentucky Compact whereby Virginia proposed that the then "District of Kentucky" be formed into an independent state, with her boundaries established (Footnote continued on following page)

Chief Justice Marshall made it clear that under the terms of the Virginia Cession the federal government, and through it Indiana, received only those rights given to it by Virginia and that under the Virginia-Kentucky Compact Kentucky succeeded to all of the rights of Virginia:

*These states, then, are to have the river itself, wherever that may be, for their boundary. This is a natural boundary, and in establishing it, Virginia must have had in view the convenience of the future population of the country. 18 U. S. (5 Wheat.) at 379 (Emphasis supplied).*

As the Chief Justice then added:

The state of Virginia intended to make the great river Ohio, throughout its extent, the boundary between the territory ceded to the United States and herself. When that part of Virginia which is now Kentucky became a separate state, the river was the boundary between the new states erected by Congress in the ceded territory and Kentucky. Those principles and considerations which produced the boundary, ought to preserve it. 18 U. S. (5 Wheat.) at 384.

It is precisely those principles and considerations on which the Commonwealth of Kentucky is basing its claim to a changing rather than a static 1792 boundary.

(Footnote continued from preceding page)

lished as they existed in 1789. See 1 Stat. 189 (1791); 1 Laws of the United States 673, 674 (1789). The State of Indiana, which was carved from the Northwest Territory ceded by Virginia to the United States, was admitted into the Union on December 16, 1816, acquiring thereby no other or greater rights either as to soil or jurisdiction than the United States had acquired under the cession from Virginia.

One such principle, which was recognized by Chief Justice Marshall as playing an important role in that case, is the doctrine of accretion. *Id.* at 380. From the days of the Romans to the present date, the rule adopted by virtually every system of jurisprudence to determine boundaries formed by a body of water, whether public or private, is that the boundary will follow changes in the shoreline, unless those changes are sudden or avulsive. *Gould on Waters* §155 (1883); I. Hyde, *International Law* §138 (1945); 72 Am. Jur. 2d *States, Territories & Dependencies* §§27, 28. This rule has been recognized and repeatedly applied by this Court to determine interstate boundaries throughout the United States since our country's earliest days. *Arkansas v. Tennessee*, 397 U. S. 91 (1970); *Louisiana v. Mississippi*, 282 U. S. 458 (1931); *Oklahoma v. Texas*, 268 U. S. 252 (1925); *Arkansas v. Mississippi*, 252 U. S. 344 (1920); *Arkansas v. Mississippi*, 250 U. S. 39 (1919); *Missouri v. Nebraska*, 196 U. S. 23 (1904); *Arkansas v. Tennessee*, 246 U. S. 158 (1918); *Nebraska v. Iowa*, 143 U. S. 359 (1892); *Iowa v. Illinois*, 147 U. S. 1 (1893); *Missouri v. Kentucky*, 78 U. S. (11 Wall.) 395 (1871).

A closer examination of a few of these cases reveals that the federal rule is and always has been in accord with the traditional doctrine. That rule was first laid down in *New Orleans v. United States*, 35 U. S. (10 Pet.) 662 (1836). In that case this Court held that

[t]he question is well settled at common law that the person whose land is bounded by a stream of water which changes its course gradually by allu-

vial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and as he is without remedy for his loss, in this way, he cannot be held accountable for his gain. . . . 35 U. S. (10 Pet.) at 717.

Thus it is clear that under the traditional rule as applied by this Court the low-water mark of the Ohio River between Kentucky and Indiana is a wandering boundary, not an unswerving line, and when through the processes of erosion or accretion, that mark is changed, the boundary follows the change. The only recognized exception to the accretion rule whereby a boundary between two states will be considered fixed and unchanging is when there has been an avulsive change in some part of the river boundary.

Generally speaking, an avulsion occurs when there has been some significant change in the bed of a river:

But if the change is violent and visible and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates. *Gould on Waters* §159.

Thus, an avulsion could occur in two situations: (1) where the main channel of a river dramatically shifts from one location to another, or (2) when an identified, stable land area finds itself on the "other" side of what would normally be the boundary.

The position which Indiana has taken, *i.e.*, that the entire Ohio River boundary between the States of Kentucky and Indiana is the 1792 line, apparently comes from an overly broad and misplaced reliance upon dicta from this Court's opinion in *Indiana v. Kentucky*, 136 U. S. 479 (1890). That case dealt solely with an avulsive change in the course of the Ohio River along a narrow and specific portion of the Kentucky-Indiana boundary and can in no way be construed to have established for all time a static boundary between the two states.

It is apparent that the boundary between Kentucky and Indiana is the northerly low-water mark of the Ohio River as it may gradually change from time to time. The river is an unchanging and fixed boundary only with respect to those areas in which an avulsive or dramatic change in the river's channel has occurred. This conclusion was in fact adopted by this Court in *Indiana v. Kentucky*, 136 U. S. 479 (1890). That dispute arose over Green River Island, which at one time had been a true island, separated from the Indiana mainland by the channel of the Ohio River. The river began to change its course so that the main channel flowed to the south of the island. The old channel bed filled up and the island became attached to the Indiana mainland. Nevertheless, the Court found that the former island still lay within the boundaries of Kentucky since the change in the Ohio River had been an avulsive change, *i.e.*, a substantial change in the bed or main channel of the river itself.

It is indisputable that under this traditional analysis the boundary between Kentucky and Indiana will never be a fixed boundary unless some avulsion has occurred which has affected the *entire* course of the Ohio River. That is, unless the entire Ohio River has at some point changed its channel for a new and different one, the boundary between the two states follows the present day course of the river as it may gradually change from time to time.

### CONCLUSION

This case presents an actual controversy between the States of Kentucky and Indiana with respect to their common boundary along the course of the Ohio River. This dispute is of serious magnitude, and the interests asserted therein by Kentucky and Indiana are asserted in their sovereign capacities. Kentucky asserts that the northern low-water mark of the Ohio River is a flexible boundary subject to change from time to time through the ordinary processes of erosion and accretion. Indiana claims that this boundary is static and unchanging and accordingly has exercised authority and control over property and activities within the disputed area.

In view of these facts the Governor and the Attorney General, on behalf of the Commonwealth of Kentucky, respectfully urge this honorable Court that the Motion for Leave to File the Complaint submitted herewith be granted.

Respectfully submitted,

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1 some personal familiarity with the situation at Carter Lake,  
2 Iowa, through which I have to drive to get from downtown  
3 Omaha to get to the airport.

4 And Carter Lake was never an island. It was  
5 originally part of the mainland of Iowa, and the river simply  
6 jumped channels and cut it off. But it remains part of Iowa,  
7 politically and legally.

8 MR. FARRAR: Let me ask you this, Mr. Voigt:

9 As I said earlier, different States have different  
10 rules. In some of them it's the middle of the river, some of  
11 them low water mark on one side or the other; but do not almost  
12 all of them recognize gradual changes should be taken into  
13 account?

14 What is so special about the terminology of the  
15 Virginia-Kentucky land grants, or sections, that means we  
16 should not have a flexible line herein?

17 And in light of that, why should we not read the  
18 Supreme Court as just having dealt with this peculiar island  
19 situation? Granted it enunciated it in broad principle, but  
20 why should we read them just in that context of islands?

21 MR. VOIGT: You have asked me two questions which  
22 in my opinion are separable.

23 The first question is: is the line fixed? or is  
24 it perhaps flexible?

25 And I think if you read the general Supreme Court



1 law, some of which we put in our brief, put in our reply brief,  
2 you might conclude if the Supreme Court were asked that  
3 question directly, it would hold that it is flexible; that is  
4 to say, if in any particular situation it was shown to have  
5 been accretion or erosion, the line could move.

6 The Supreme Court has not addressed that question,  
7 and it is certainly a fair reading of both the Supreme Court  
8 cases and the Kentucky cases that Kentucky is an exception;  
9 and that that particular line really was fixed in the literal  
10 sense.

11 But I don't know what the Supreme Court would do  
12 if it had to address that precise question. It might very  
13 well conclude that talking about it as a fixed line in 1792  
14 was a little bit of an overstatement.

15 I think on the other hand the court clearly intended  
16 to say and did say, that you look for the 1792 low water mark;  
17 that is your starting point; that's your benchmark.

18 In the case of Green River Island they did not  
19 have to worry about accretion or erosion, because that was  
20 an evulsion case.

21 So I think the answer to your first question is,  
22 maybe.

23 And the answer to the second question is no

24 They did intend to fix a line, but we don't know  
25 what they would do if they have a specific set of facts

1 involving erosion or accretion.

2 MR. FARRAR: Okay.

3 We do know what they would do -- aren't we in a  
4 similar position to U.S. District Court judges in diversity  
5 cases? In other words, we sometimes have to guess what State  
6 law would be.

7 Originally they just set out and just applied State  
8 law to whatever it was. But then some of the -- if you want  
9 to call them more "liberal" judges -- whatever their philosophy  
10 -- that even State law was clear if it had been decided 50  
11 years ago, 60 years ago, they were supposed to look at more  
12 recent trends and decide what the State law would decide if  
13 deciding the question anew.

14 Why are we not now in that same position today,  
15 if I understood what you said: we ought to look not only at  
16 what the Supreme Court said back in the nineteenth century,  
17 but what they might say now; or what they might say in this  
18 case between Ohio and Kentucky.

19 Why shouldn't we try to make that sort of best-  
20 guess?

21 MR. VOIGT: The basic answer is because you don't  
22 have to.

23 In other words, there is no argument here about  
24 a foot of erosion and three feet of accretion. We are talking  
25 about the big swing between the normal pool, and elevation of